No. 14624

United States
COURT OF APPEALS
for the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

ARTHUR L. LEE and FLORENCE GRUSENMEYER, formerly Florence Lee,

Appellees.

BRIEF OF APPELLEE, ARTHUR L. LEE

Appeal from the United States District Court for the District of Oregon

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STATEMENT OF THE CASE

Narrative Statement

The appellee, Lee, believes the narrative statement contained in appellant's brief (pp. 3-6) to be deficient since certain facts are omitted from this statement.

The controlling facts, none of which are disputed, are these:

Nov. 16, 1915: Appellant issued to appellee, Arthur L. Lee, its policy No. 4860276, in the face amount of

$3,000; this policy provided that appellee Lee had the unqualified right to change the beneficiary (Ex. 4, R. 59-62);

July 31, 1926: Appellee Lee went through a marriage ceremony with the present Florence Grusenmeyer. This marriage was not valid, through the lack of capacity on the part of Florence Grusenmeyer to enter into the contract of marriage (R. 34-5, Findings VII, VIII and X);

July 31, 1926: At the time of the purported marriage, this policy had a net cash value of $208.23, being subject to a loan of $100.00 (R. 35, Finding IX);

The parties lived in California, where community property laws exist, a portion of the time during the continuance of the purported marriage (R. 35, Finding VIII);

Sept. 26, 1926: The present Florence Grusenmeyer, then known as Florence Lee, was made beneficiary of policy (R. 35, Finding XI, also R. 62);

May 27, 1932: Appellant changed beneficiary of policy to Reetha M. Shelley, at request of appellee Lee (R. 21-22, Finding XII, also R. 62);

Dec. 21, 1932: Claim of present Florence Grusenmeyer made to appellant (R. 54). This claim is very broad in scope and included a demand that no change of beneficiary of policy be allowed.

Jan. 25, 1934: A decree based upon service by publication was entered in a suit by appellee Lee against the present Florence Grusenmeyer, in the Circuit Court of the State of Oregon, for the County of Multnomah,

declaring the purported marriage void ab initio. No property rights between the parties were determined (R. 22, Finding XIV);

Jan. 25, 1934: At the time of the annulment of the purported marriage, the policy had a net cash value of $35.99, being subject to a loan in the amount of $550.00 (R. 22, Finding XV);

June 7, 1937: Beneficiary of policy changed by appellant at request of appellee Lee, to Isabel Clark (R. 22-23, Finding XVI, also R. 62);

Dec. 1, 1952: Appellee Lee made demand upon appellant for the cash value of the policy which amounted at that time to the sum of $1,711.25. This cash value was refused because Florence Grusenmeyer did not join in the request (R. 37, Findings XVII and XVIII). No further premiums were paid (R. 37-38, Findings XX and XXI);

That the appellant was furnished with certified copies of all decrees determining the marital status of Arthur Lee and the present Florence Grusenmeyer (R. 23, Finding XIX);

Dec. 18, 1952: Appellant asserted to appellee Lee that the cash value would only be available until February 6, 1953, and then only if Florence Grusenmeyer joined in the application (R. 64-5, 6, Ex. 6 and 7);

May 1, 1953: Action commenced by appellee Lee against appellant in the Circuit Court of the State of Oregon for the County of Multnomah, for the cash value of $1,711.25, together with interest at the rate of

6% per annum from Dec. 18, 1952, together with $1,-750.00 as reasonable attorneys' fees and his costs and disbursements (R. 38, Finding XXII);

June 5, 1953: Appellant asserted to appellee Lee that Policy had been converted into Temporary (or Extended Term) Insurance (R. 67, Ex. 8) which had no cash value (R. 38, Finding XXII);

July 14, 1953: Appellant filed this suit against appellee Lee, Florence Grusenmeyer and Isabel Clark, and paid the sum of $1,711.25 into the registry of the Court. No supplemental bond was filed to cover any additional liability of appellant as claimed by appellee Lee.

STATUTES INVOLVED

The Federal Interpleader statute (28 USCA 1335) provides:

> "(A) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the value of $500 or more, if
>
> "(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plain-

tiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

"(B) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another."

SUMMARY OF ARGUMENT

The action of the trial court in dismissing the complaint was proper because:

No Valid Basis for Interpleader Exists

1. Appellant did not meet the requirements of a strict or pure bill of interpleader in that it was not a neutral stakeholder at the time of the commencement of the litigation by appellee Lee in the courts of the State of Oregon, since at that time it asserted that the cash value of the policy had been lost, and is not now neutral as to the appellee Lee's claim in excess of the cash surrender value.

2. Appellant did not meet the requirements of a bill in the nature of an interpleader, or so-called statutory interpleader, because it did not tender into court, or se-

cure the payment of the claim of the appellee Lee (which is greater than the amount tendered because of costs, interest and attorneys' fees demanded in the state court litigation), by filing a bond as provided by 28 USCA 1335 in the event that such additional claim were allowed upon final adjudication thereof.

No Colorable Adverse Claims Exists in Favor of Appellee Grusenmeyer

The purported claim of the appellee Grusenmeyer is sham and frivolous, and must have been known to be such by appellant because the net cash value of the policy at the time of the annulment of the purported marriage was less than at its inception; that under the laws of California, a wife would have no rights in such a policy, as such, but would have a right against the separate property of the husband for the extent to which community property was used to increase the value of the policy; that there was no such increase of net value during the existence of the alleged community in this case.

Attorneys' Fees Properly Considered by Trial Court

Allowance of this interpleader would have deprived the appellee Lee of his rights under Oregon statutes to costs, interest and attorneys' fees which were incurred by reason of appellant's repudiation of its liability under the policy, and which were demanded by Lee in his action commenced in the courts of the State of Oregon prior to the commencement of this action.

ARGUMENT

No Valid Basis for Interpleader Exists

The facts in the instant case are not such as to allow a strict or pure interpleader:

1. There are not two bona fide adverse claimants, which point will be covered more completely later.

2. Appellant did not stand neutral prior to commencement of the state court litigation by appellee Lee, since it asserted that the cash surrender value of the policy would be lost, and it persisted in this claim subsequent to the filing of this litigation in asserting that this cash value had been lost.

No right exists to a bill in the nature of interpleader because appellant did not pay into court the amount of the claim of appellee Lee, namely, the cash value, plus interest, costs and attorneys' fees, and posted no bond to comply with Sec. 1335, Title 28, USCA.

In the case of a strict or pure interpleader, one of the essential elements is that the stakeholder stand entirely neutral as to the claims of all parties.

The case of *Federal Life Ins. Co. v. Looney,* 180 Ill. App. 488 at 496, is an example of the cases so holding: in this case, the court said:

> " . . . The amount due cannot be the subject of controversy in an interpleader suit and the difference between the amount claimed and the sum which plaintiff admitted and paid into court presents an insuperable objection to the prosecution of this suit as an interpleader (citing authorities). . . ."

In *Connecticut General Life Ins. Co. etc. v. Yaw* (DC WD NY 1931), 53 F. 2d 684, the court said, at page 686:

> " . . . It has been said to be an undeviating rule that claimant shall raise no question as to the amount of the claim. . . ."

Other authorities holding to the same effect are:

Heinemann v. Heinemann (CCA 6th Cir. 1931), 50 F. 2d 696.
Hooper v. Carlson, 134 Or. 241 at 245, 293 Pac. 410.
Annotation 108 A.L.R. 267.
48 C.J.S., Interpleader, Sec. 16c, p. 60.

In the case of a bill in the nature of interpleader, or so-called statutory interpleader, the stakeholder need not stand entirely neutral as to all the claims of all of the parties. In such a case, however, the plaintiff is not released upon payment into court of the sum it admits to be due, but is held in court until all claims are adjudicated.

In the case of *U. S. v. Sentinel Fire Ins. Co.* (CA 5th Cir. 1949), 178 F. 2d 217, two claimants asserted claims against the stakeholder in excess of the amount admitted by it to be due. They had commenced litigation in the state courts and when they filed their answer, they reiterated their claim for the additional amount. The court said (p. 223):

> "Since the assignees had claimed $17,000.00 rather than the amount of the loss, the insurance companies were not dismissed upon holding by the Court below that it was an appropriate case for interpleader. They were required to stay in the case and introduce the testimony on final hearing

of the insurance adjuster as to the damage caused to the property by the fire. Under these facts we cannot properly call this a case of pure interpleader. It seems to be merely a statutory interpleader wherein the plaintiff need not stand neutral as to all the claims of all the parties. . . ."

In *John Hancock Mutual Life Ins. Co. v. Kegan,* 22 Fed. Supp. 326, there were two claimants, one demanding $13,000 and the other $30,000. The insurance company admitted its liability for the sum of $13,035 and executed a bond agreeing to pay $30,000 if it were held liable therefor.

The court said, at p. 331:

"The plaintiff admits its liability for the sum of $13,035 and on the averments of the bill this amount is claimed by each of the defendants, one of whom has brought suit to recover it (as a part of her whole claim of $30,000), and the other defendant has threatened suit therefor. Therefore with respect to the sum of $13,035 the case presents the simple aspect of a strict bill of interpleader and to the extent of the amount so admitted by the plaintiff to be due there seems to be no reason for denying to it relief from double vexation even though as suggested by Judge Learned Hand in Sherman National Bank v. Shubert Theatrical Co. D.C. 238 F 225, 230, supra the case may hereafter have to be transferred to the law side of the court for jury trial or dismissed with respect to the balance of the claim of Mrs. Kegan after final and effective decree regarding the smaller sum of $13,-035. . . ."

Other authorities are:

Sherman National Bank v. Shubert Theatrical Co. (DC SD NY 1916), 238 F. 225, aff'd 247 F. 256.

Standard Surety & Casualty Co. v. Baker (CCA 8th Cir. 1939), 105 F. 2d 578.
Edner v. Mass. Mutual Life Ins. Co. (CCA 3rd Cir.), 138 F. 2d 327.
Gen. Am. Life Ins. Co. v. Floom (DC Pa.), 96 Fed. Supp. 488.

The appellant, however, spurned its remedy of a suit in the nature of interpleader, or statutory interpleader, and made no gesture towards filing a bond or paying into court a sufficient sum to reimburse the appellee Lee as to interest, costs and attorneys' fees, if it should be adjudicated that he is entitled to these sums.

It continued to spurn this remedy, in filing its brief herein, for it asserted therein (p. 20), "If it is a proper case for interpleader, then there can be no issue as to the insured's right to attorneys' fees."

Since the requirements of a strict or pure bill of interpleader were not met by appellant and appellant is determined to ignore its remedy of a bill in the nature of interpleader, or statutory interpleader, by paying into court or securing the payment of any additional claims of the appellee Lee, which arose by reason of its conduct in repudiating its liability under the policy, the trial court properly dismissed the interpleader.

There Are Not Two Colorable Adverse Claimants to the Fund Deposited in the Registry of the Court

It can be demonstrated that the claim of Florence Grusenmeyer to the proceeds of this policy is sham and frivolous, and that appellant knew or should have known it.

First: The net cash value of the policy at the time of the annulment was less than at the time of the purported marriage (R. 21, 22, Findings IX, XV).

Without considering the laws of California, this demonstrates that any community funds paid as premiums had been withdrawn as loans, and that no interest in the policy existed in favor of the alleged community or the present Florence Grusenmeyer at the time of the annulment. Any premiums paid with community funds, in excess of the amount withdrawn as a loan, was the cost of the protection aspect of the policy during the existence of the alleged community.

Any claims that Florence Grusenmeyer might have as to the money secured from the appellant as such loan are not involved in this case.

Second: Appellee Lee has the unrestricted right to change the beneficiary of the policy (R. 33, Finding V). Under California law, the appellee Grusenmeyer had no rights in and to the policy as such; *New York Life Ins. Co. v. Bank of Italy,* 40 Cal. App. 242, 214 P. 61, even if community funds were used to pay the premiums: *Shoudy v. Shoudy,* 55 Cal. App. 447, 203 P. 437; *McEwen v. New York Life Ins. Co.,* 23 Cal. App. 694, 139 P. 242; *Union Mutual Life Ins. v. Broderick,* 196 Cal. 497 at 506, 238 P. 1034.

Third: Assuming that the cash value of the policy had been increased by payment of premiums by community funds, any rights of the appellee Grusenmeyer would not have been in the policy or its proceeds, but a

separate right against the appellee Lee with which the appellant would have no concern.

The California court had a similar situation in front of it in the case of *Gelfand v. Gelfand,* 136 Cal. App. 448, 29 P. 2d 271, where the court held, under such circumstances, the wife had no claim against the policy or its proceeds, but had a claim against the husband's separate property to the extent community funds had increased the value of the policy.

In the instant case, since there was no increase in the net cash value of the policy, no such claim could have existed.

The appellant knew, or should have known, these facts. The low esteem in which it originally held the claim of the appellee Grusenmeyer is demonstrated by the fact that although she demanded that no change of beneficiary be allowed (R. 54, Ex. 2) appellant did, after receipt of that claim, change the beneficiary to Isabel Clark at the request of the appellee Lee (R. 22, 23, Finding XVI, also R. 62).

The appellee Grusenmeyer, in making her claim, was not content to demand the increase in cash value during the existence of the alleged community, but wanted and wants the entire cash value of the policy (R. 16, 17, 54). However, she has indicated (R. 68, Ex. 9) that she does not value this claim highly enough to appear in court to press the same. Apparently appellant, now, values it more highly than she. Appellant urges that because the trial court struck out proposed Finding No. XXV (R. 39), this shows the trial court did not regard the claim

as sham and frivolous. It is submitted that the trial court could have regarded this finding as surplusage as the other findings clearly show the claim of the appellee Grusenmeyer to be sham and frivolous.

This claim is so patently sham and frivolous that the trial court rightly dismissed the complaint. Under the authorities, such dismissal was proper:

A case illustrative of this point is *Mutual Life Insurance Co. of New York v. Egeline* (DC ND Calif.), 30 Fed. Supp. 738, where the court said (p. 740):

> " . . . if plaintiff knows to which of the claimants he can rightfully or safely pay, and thus protect himself, or if the hazard to which he conceives himself to be exposed has no reasonable foundation, he cannot maintain this equitable remedy. Pomeroy's Eq. Jur. vol. 4, Sec. 1459, p. 3452; id Sec. 1461, p. 3457; Daniel, Chancery Practice, Sec. 1560; Story's Eq. Pl. Sec. 291, p. 289. . . ."

In *Royal Neighbors of America v. Lowary* (DC Mont.), 46 F. 2d 565, the court said:

> "Complainant knew or in ordinary diligence could have known to whom and in what proportions the amount of the certificate is payable, and it is well settled this defeats interpleader, even though any dissatisfied claimant might threaten a hopeless suit, though none alleged. There can be no resort to equity save in case of real necessity, and not merely as a convenient escape from duty and labor at the cost of the beneficiaries, generally including fat fees for insurer's counsel. . . ."

In *Mass. Mut. Life etc. v. Murdock* (DC Oregon), 56 Fed. Supp. 500, the court in discussing a situation such as the instant one where only one party contested the interpleader, said:

"Although if in the exercise of that jurisdiction it is determined that two apparently valid claims do not exist, the suit might be dismissed and the deposit released."

See also:

New York Life Ins. Co. v. Valz (CCA 5th Cir.), 141 F. 2d 1014.
48 C.J.S., Interpleader, Sec. 14, p. 52.

Argument on the Issue of Attorneys' Fees

Appellant asserts that the reason the interpleader was dismissed was because the trial court felt that if it allowed the interpleader, the insured would be denied the right to recover attorneys' fees under Oregon statutes.

This undoubtedly was one of the reasons for the dismissal.

Consider this fact situation: Although all the facts were known to the appellant, and although it had refused to recognize the demands of the appellee Grusenmeyer that the beneficiary be not changed, when this controversy arose it did not hold the matter in abeyance or even file an interpleader. Although it knew the appellee Lee wanted the cash value, it asserted that unless additional premiums were paid, the cash value would be lost (R. 64, 65, 66, Ex. 6, 7).

At this point appellee Lee had no alternative, if he wished to enforce his rights under the policy, but to commence action. Even after that, the appellant asserted that the cash value of the policy had been lost (R. 67, Ex. 8).

Apparently appellant reconsidered its position at that time and determined that it had been wrong in denying payment, but it still wished to avoid liability for interest, costs and attorneys' fees.

Although the demand in the state court action was in excess of $3,000 and appellant could have removed the same to the United States Courts, it chose to commence this separate action, but paid into court only the face amount of the cash surrender value.

What the appellant has tried to accomplish here is illustrated by a case also involving the appellant, where originally liability was denied, and afterwards in an effort to escape liability for attorneys' fees, etc., the appellant filed a bill in interpleader. In *New York Life Insurance Co. v. Veith* (Texas Civil Appeals), 192 S.W. 605 at 607, the court said:

> "Appellant cannot be permitted to deny all liability to the beneficiary named in an insurance policy for a year and then, when it ascertains it cannot maintain its defense, file an interpleader in order to escape the statutory penalties. No case has been cited which tends in the least to justify the acts of appellant."

And, in *Andrews v. Travelers Insurance Co.* (Ga.), 89 S.E. 522, in a syllabus by the court, it was held that in a case where one of the defendants had sued the insurance company not only for the face of the policy, but also for damages and attorneys fees, an order allowing interpleader upon payment into court of the face amount of the policy only was erroneous because it ignored the fact that one of the contestants not only

claimed to be entitled to the proceeds of the policy but also sought a judgment against the company for damages and attorneys' fees which would be cut off by the order of the court without a trial.

In *Metropolitan Life Insurance Co. v. Brown* (Mo.), 186 S.W. 1155, in commenting upon such a situation, the court said:

> " . . . It cannot be that appellant can defeat this claim by ignoring it entirely and tendering and arbitrarily compelling the claimant to accept a much smaller sum. . . ."

See also:

Couch on Insurance, Sec. 2125, p. 6881, Note 9.

Whether the allowance of attorneys' fees in such a case be considered compensatory or punitive, there was a necessity for the appellee Lee to commence the action in the state court, and the right to attorneys' fees and costs accrued in his favor.

Under such circumstances, can it be said that Lee should not be given the full benefit of the Oregon statutes pertaining to attorneys' fees, interest, and costs allowable in such cases as this? The appellant not only has endeavored to deprive him of these rights, but also asserts the right to have its attorneys compensated out of the fund. (R. 25, Plaintiff's contention No. 9, Pretrial Order.)

As set out in appellant's brief (p. 19) the purpose of the statute awarding attorney fees is to "discourage lengthy and expensive litigation," but appellant, in its

efforts to avoid its liability in this respect, has made this litigation exceedingly lengthy and exceedingly expensive.

It is to be noted that the memorandum of the Court (R. 31) says that it does not seem right "under the circumstances here present" that the appellant avoid the state statute respecting attorneys' fees (R. 31).

Under the circumstances we respectfully submit that the question of the allowance of attorneys' fees to the appellee Lee was a proper one for the trial court to consider, and the attempted evasion thereof by the appellant a proper reason for denying the interpleader.

Since the claim of Florence Grusenmeyer is so palpably baseless, as heretofore shown, the question of attorneys' fees undoubtedly was not the only reason for the court's decision.

CONCLUSION

In conclusion it is respectfully urged that the court rightfully dismissed the interpleader and relegated the appellant and the appellee Lee to their rights and liabilities in the state court action.

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